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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1120

FRANCES METZGER WIRTH STEPHAN, GUARDIAN OF THE ESTATE OF CHARLES WIRTH, *Petitioner*,

vs.

THE MARLIN FIREARMS CO., INC., GERHARD HOHN, ADMINISTRATOR OF THE ESTATE OF F. A. LANDERS, JOHN MISCIUCH AND CARL PAVLICK, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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THE MACK CO., NORTH HAVEN, CONN.

INDEX

	PAGE
Opinion Below	1
Question Presented	1
Statutes, Rules and Constitutional Provisions Involved	2
Statement of the Case	
I. General Background	2
II. Events on the Voir Dire	4
Argument	
I. Petitioner's Post Trial Investigation of a Juror Could Have Been Accomplished Long Before Trial	8
II. There is no Conflict of Decision	9
Conclusion	13

CITATIONS

	PAGE
Butler vs. *United States*, 191 F.2d 433, 435 (4th Cir. 1951)	10
Dennis vs. *United States*, 339 U.S. 162	11
Frazier vs. *United States*, 335 U.S. 497	11
Frederick vs. *United States*, 163 F.2d 536 *cert. denied*, 68 S. Ct. 87, 332 U.S. 775	11
Kiernan vs. *VanSchaik*, 347 F.2d 775 (3d Cir. 1965)	10
Photostatic Corporation vs. *Ball*, 338 F.2d 783 (10th Cir. 1964)	10
Scales vs. *United States*, 227 F.2d 581, *cert. denied* 76 S. Ct. 542, 350 U.S. 992	11
Speak vs. *United States*, 161 F.2d 562	11
Speils vs. *United States*, 263 F.2d 609, at 612, *cert. denied* in 79 S. Ct. 1439, 360 U.S. 920, 3 L. Ed. 2d 1535	9
Swain vs. *Alabama*, 380 U.S. 202	10
United States vs. *Sferas*, 210 F.2d 69, *cert. denied*, *Skally* vs. *United States*, 74 S. Ct. 630, 347 U.S. 935	11
Yarborough vs. *United States*, 230 F.2d 56 *cert. denied*, 76 S. Ct. 1034, 351 U.S. 969	11

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BRIEF OF RESPONDENT, THE MARLIN FIREARMS CO., INC. IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is reported in 353 F.2d 819.

QUESTIONS PRESENTED

Where the trial court was induced to ask a much narrower question on the Voir Dire than had been previously requested

by Petitioner's counsel, can Petitioner now claim an abuse of discretion by the trial court in its conduct of the Voir Dire?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent Federal Rule and Amendment to the Constitution and Statute are set forth in the petition at page 2.

STATEMENT OF THE CASE

I. — General Background.

This lawsuit involved a gun, millions of which type have been made by the defendant Marlin since at least 1891. It was a .22 caliber rifle with an exposed hammer which contained a full-cock notch and a half-cock notch. The gun had a safety position which was the half-cock notch. Marlin made the particular gun in question in 1947. It was sold to a firm in New York city. Thereafter, it passed through the hands of others until, eventually, it was sold to a dealer named Benton, in October, 1960, in Rockville, Connecticut. He put the gun through extensive tests before he bought it. He sold it in February, 1961, to another dealer named Landers from Norwalk. Landers sold it to Pavlick and/or his uncle Misciuch.

Landers showed Pavlick how the safety worked. The plaintiff Wirth, more experienced and older than Pavlick, figured out himself how the gun operated and showed it to Pavlick.

They both took a hunter-safety course from a Mr. Fay at the Norwalk Armory. This was the N.R.A. course. During Pavlick's first session in the course, during which he used the

gun in all its various ways, he found the gun jammed. This particular complaint had nothing to do with the safety position of the gun and there were no complaints about it.

Pavlick returned the gun to Landers who brought it to New Haven and the Marlin plant. Landers was familiar with the repair department at Marlin and he knew that the gun was properly repaired and then heard it test-fired. He stated he knew from past experience Marlin would not return the gun unless it was perfectly all right. He was charged one dollar for the work and there was no tag or shop order or slip made out in connection with the work. He then returned it to Pavlick without charge. The repairs in no way involved the safety position.

On November 2, 1961, these two teenage boys, Pavlick and Wirth, went hunting. After they got out of the car, Pavlick put the gun on safe, without any trouble. In fact, up until the time of the fatal slip, Pavlick had put the gun in the safety position several times without difficulty. The boys came to a log where Pavlick fired at the log to flush out game. Nothing happened so Pavlick put the gun on safe once again and the boys continued on into the woods. They came to a second log where the procedure was repeated. This time, however, as Pavlick was putting the rifle into the safety position, and at a time when Wirth was walking directly in front of him, Pavlick's thumb slipped off the hammer and the weapon fired, striking his friend in the back.

Upon the trial of this case, before a jury of twelve, the basic facts were not in dispute. On the issue whether the gun was or was not reasonably safe, there was conflicting evidence. Plaintiff's expert witness said it was not. (A. 163-255) [1]. The

[1] References to the extract of the record printed as an Appendix for the Court of Appeals by Petitioner are designated as "(A. —)".

defendant Marlin produced several witnesses who testified the gun was reasonably safe, including Mr. Teator (R. A. 114a), Mr. Robinson (R. A. 151a), Mr. Benton (R. A. 204a), and Mr. Kuhlhoff. (R. A. 227a) [2]

There were several other areas of testimony where Petitioner's gun expert said one thing and Respondent's experts said the opposite. The boy who was holding the gun testified it was simply a case where his thumb slipped off the hammer and it was purely an accident. The jury deliberated for several hours over a period of two days and had read back to it much of the testimony, none of which involved the experts. (R. A. 267a) The jury returned a defendant's verdict and answered several specific interrogatories relating to each defendant. Petitioner appealed from the judgment in the denial of her Motion For a New Trial on several grounds. The Court of Appeals affirmed on all points.

II. — Events On The Voir Dire.

Pursuant to Rule 47(a) of the Federal Rules of Civil procedure, and the practise in the District Court for Connecticut, the trial judge conducted the Voir Dire examination himself, interrupting for conferences at the Bench and suggestions from counsel. A reading of the entire Voir Dire examination as set forth in the Appendices of Petitioner and Respondent, and the transcript of the examination on file, will disclose that at the outset the trial court exercised great care to inform the jury panel of all the relevant considerations necessary in order

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[2] References to the extract of the record printed as an Appendix for the Court of Appeals by the Respondent are designated as "(R. A. —)".

to insure the selection of an impartial jury. After the initial questions identifying the attorneys and clients and after pointing out that the case involved the manufacture, sale, repair and discharge of a .22 caliber rifle, a particular juror stood up and made it known that he had considerable experience in connection with firearms. The court inquired of the gentleman, Mr. Buchalter, if his experience would impair his capacity to serve impartially.

Thus, at the very outset of the Voir Dire the entire panel was alerted to the fact that any experience relating to firearms should be disclosed. It is the speculative claim of Petitioner that perhaps one juror finally selected was a so-called gun expert. The choice of words was that of the Court of Appeals. (Appendix A. of Petition, p. 27)

Thereafter the trial court inquired of the panel if there was anyone who had heard of or knew anything about the case or whether there were any other circumstances that would occur to anyone that had not been disclosed and that would bear upon their qualifications to serve. (A. 5a)

Thereafter followed the particular discussion at the Bench which forms the basis for Petitioner's claim that her right of peremptory challenge was impaired by limitations of the trial court.

At the Bench, the following occurred:

> "The COURT. I know that and I will try to take that into account in ruling finally on challenges for cause. I think we can end up with a jury satisfactory to all concerned, but I really think this question about are there anybody familiar with the use of firearms is going to lead nowhere. It certainly isn't going to produce challenges for cause as far as I'm concerned. There are men who have been in

the military service here. It is one of those questions that gives rise to idle chatter it seems to me. I will be glad to ask whether anyone has been in the business of repairing firearms or expert of any sort, if you wish, but I think in a country where every citizen has a right to bear arms, it's like asking in a tax case whether anybody has filed their income tax returns or had any trouble with them.

Mr. DESMOND. Your Honor, on that point would it be possible to ask a narrow question as to whether they belong to the National Rifle Association or any gun club? That would narrow it down.

The COURT. Well I think that's fair enough. I'd be inclined to.

Mr. KOSKOFF. I have one other question and that is does anybody—

The COURT. Just a second now. Member of the National what?

Mr. DESMOND. Rifle Association or any gun club.

The COURT. I will do that much."

Thereafter, the court did inquire of the panel whether anyone was a member of the National Rifle Association and whether anyone was a member of any gun club. In other words, the court indicated that it was willing to ask whether any prospective jurors had been in the business of repairing firearms or expert of any sort. However, in view of the statement of Mr. Desmond, counsel for the Petitioner, the court was asked to make a much more narrow inquiry to the jury as to whether anyone on the panel belonged to the N.R.A. or any gun club.

Obviously, were it not for the appeal of Petitioner's counsel to the court to narrow down the court's proposed inquiry, the court would have made the specific inquiry of whether or not any of the prospective jurors was an expert of any sort.

Having induced the court to forego asking the panel if anyone was an expert of any sort, it hardly seems fair at this point to make claim that the court committed error in its conduct of the Voir Dire examination because of its failure to make the other inquiries.

The Circuit Court of Appeals obviously recognized the fact that the action of the trial court was induced by plaintiff's counsel. It points out that the court acquiesced in the request and did indeed ask the question as limited by counsel. (Opinion of Court of Appeals, Petition p. 26)

Further, the trial court out of an excess of caution, reiterated the question concerning the National Rifle Association or membership in any gun club. (R. A. 12a)

After the jury and alternates had been selected the trial court instructed the panel (R. A. 24a) as follows:

> "In any event you will not be obliged to be here any further until the trial of this case is actually ready, until we're ready to go forward in the taking of the evidence. In the meantime please be careful not to discuss this case with anyone, don't let any information about it come to you. If you by any chance live in the Fairfield County area be careful not to listen to anything about the case or read anything about it, if there should be anything about it in (Tr. 54) the newspaper.
>
> It is obviously a case of importance by both sides and we want it tried by a completely impartial jury."

ARGUMENT

I.

PETITIONER'S POST TRIAL INVESTIGATION OF A JUROR COULD HAVE BEEN ACCOMPLISHED LONG BEFORE TRIAL.

Petitioner's brief, page 11, refers to a post trial investigation of the jury foreman. It is claimed said investigation demonstrates probable prejudice on the part of the juror.

In fact, Petitioner expressly and unequivocally withdrew any claim concerning prejudice during oral argument in the Circuit Court of Appeals on October 20, 1965. During argument by Respondent Marlin, its counsel began to address itself to this issue of claimed prejudice growing out of said post trial investigation. He was interrupted by Petitioner's counsel who stated that any claim with reference to said investigation was withdrawn. Respondent's counsel, therefore, immediately ceased discussion on that issue.

In spite of said withdrawal the Circuit Court of Appeals nevertheless referred to said investigation in its opinion, characterizing Petitioner's claims as speculative and pointed out that Judge Timbers very expressly charged the jury to base its decision only on the evidence introduced in the case.

The Court had reference to the following excerpts in the charge:

> "In your task of determining the issues I've just summarized in this case, you may only consider the evidence which has been introduced in the case, obviously." (R. A. 27a)
>
> "In conclusion, ladies and gentlemen, take this case to the jury room, determine the facts on the basis of the evi-

dence as you have heard it, apply the law as I have attempted to outline it to you, then render a verdict fairly, uprightly and without a scintilla of prejudice, which I am sure is unnecessary to say to you ladies and gentlemen." (R. A. 30a)

The jury was chosen on Friday, January 24, 1964. Trial did not commence until Thursday, February 13th, some three weeks later. The jury was composed of nine men and three women. (R. A. 21a) If Petitioner was dissatisfied with the jury as selected, and if she desired to pursue the claimed error on the Voir Dire, ample time was available to conduct said investigation prior to trial in the same fashion as occurred following the adverse jury verdict. Then, when counsel reconvened on February 13th, Petitioner could have made any objection it desired to any juror or jurors allegedly tainted.

II.

THERE IS NO CONFLICT OF DECISION.

The basic rule applicable is that a considerable discretion is lodged in the trial court as to questions to be posed in the Voir Dire.

> "The questions that should be asked upon a voir dire examination is a matter of discretion; and that discretion belongs to the trial court, not to us. Ours is the duty only to examine the record to determine whether that discretion has been abused."
>
> *Speils* vs. *United States*, 263 F.2d 609, at 612, *cert. denied* in 79 S. Ct. 1439, 360 U.S. 920, 3 L. Ed. 2d 1535.

In *Butler* vs. *United States*, 191 F.2d 433, 435 (4th Cir. 1951) the Court of Appeals stated: "This Court is not free to interfere unless a clear abuse of discretion is shown."

Petitioner relies heavily on *Swain* vs. *Alabama*, 380 U.S. 202. *Swain* in no way alters the basic rule. There this Court reviewed a rape conviction of a negro and the use by a state court prosecutor of peremptory challenges to exclude negroes from the jury. The case did not involve the conduct of a Voir Dire examination by a Federal District Trial Court under Rule 47(b) but rather the practise of exclusion of negroes in Talladega County, Alabama.

Further reliance is placed on *Kiernan* vs. *VanSchaik*, 347 F.2d 775 (3d Cir. 1965). The Court below was well aware of *Kiernan*, (Petitioner's Appendix p. 26), where specific written interrogatories were submitted to the trial court concerning the insurance question in a jurisdiction having a local custom forbidding a detailed Voir Dire. As pointed out below counsel's request was general and imprecise and in fact the jurors were alerted to indicate whether their experience would prejudice a verdict after a particular juror had been disqualified because of expertise.

Petitioner further relies on *Photostatic Corporation* vs. *Ball*, 338 F.2d 783 (10th Cir. 1964). Once again, this case did not involve the conduct of the Voir Dire by the trial court, as such, as allegedly limiting counsel's peremptory challenges, but in fact concerned misunderstanding by the jurors of the Voir Dire questions of the court. Several jurors testified after the trial they had misunderstood the import of the questions. It can hardly be claimed here that the trial court's questions were misunderstood. Again, the decision does not depart from the general proposition of the Court's broad discretion.

It is not true, as claimed, (Petition p. 17) that the Court of Appeals treatment of the issue was conclusory and that no other justification for the trial court's ruling could have been advanced beyond the fact the proposed question was not relevant to challenges for cause. The opinion below noted Judge Timbers' refusal of the proposed inquiry because it was too broad in scope and was imprecise. More importantly, as previously noted, Judge Timbers was willing to inquire as to expertise but instead, Petitioner requested a different and more specific inquiry which was then made.

Several other decisions support the basic rule applicable to this case that the trial court has considerable discretion in its conduct of the Voir Dire. In *United States* vs. *Sferas*, 210 F.2d 69, *cert. denied*; *Skally* vs. *United States*, 74 S. Ct. 630, 347 U.S. 935, it was said that the qualifications of a juror rests in the sound discretion of the trial court and its rulings should not be interferred with on appeal except on a clear showing of abuse.

Accord: *Frederick* vs. *United States*, 163 F.2d 536 *cert. denied*, 68 S. Ct. 87, 332 U.S. 775. *Speak* vs. *United States*, 161 F.2d 562. Also, *Yarborough* vs. *United States*, 230 F.2d 56 *cert. denied*, 76 S. Ct. 1034, 351 U.S. 969, and *Scales* vs. *United States*, 227 F.2d 581, *cert. denied* 76 S. Ct. 542, 350 U.S. 992.

Petitioner also claims error in the refusal of the trial court to inquire whether any member of the panel owned stock in any company that manufactured guns. The court had already inquired of the panel (R. A. 4a) if anyone had been an employee, stockholder, director or officer of the Respondent Marlin Firearms Company and whether the jurors and members of their families had been in any way connected with Marlin.

Counsel were also asked to name all of the witnesses they proposed to call, which was done. (R. A. 13a, 14a)

The proposed inquiry was hardly relevant. There is no reason to expect that interest in some other gun company other than the Respondent Marlin would have any bearing on a particular juror's view of the case. The absence of authority on this particular point would indicate that it is hardly an important question of federal law requiring treatment by this court. This court has held that in a criminal case prosecuted by the government for the violation of a federal statute that jurors are not challengeable nor is there any implication of bias on their part simply because the jurors are employees or related to employees of the government. *Dennis* vs. *United States*, 339 U.S. 162; *Frazier* vs. *United States*, 335 U.S. 497.

Once again the real question is whether or not a clear abuse of discretion on the part of the trial court was shown. Bearing in mind the court's admonitions to the jury to only consider the evidence introduced in the case (R. A. 27a), and to render a verdict fairly, uprightly, and without a scintilla of prejudice (R. A. 30a) and the obvious care with which the trial court conducted the Voir Dire examination, Petitioner's claim falls far short of demonstrating said abuse.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be denied. A reading of the Voir Dire indicates the trial court carefully conducted the Voir Dire with the result that a fair and impartial jury was selected. As stated by the Court of Appeals below there is no evidence in the record that Petitioner was denied the information necessary to exercise an intelligent use of her peremptory challenges. Petitioner stresses the fact that the injury was most severe. The Court below was well aware of the extent of injury. The inquiries that were addressed by the trial court to the panel were more than sufficient to insure the selection of an impartial jury. Petitioner has failed to demonstrate an abuse of the trial court's wide discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martin E. Gormley, counsel for respondent, in opposition to the petition for a writ of certiorari and a member of the bar of the Supreme Court of the United States do hereby certify that on the 12th day of May, 1966, I served a copy of the foregoing brief in opposition upon the petitioner by mailing a copy thereof, postage prepaid, to Alfred F. Scanlon, Esq., counsel for petitioner, 734 15th Street, N.W., Washington, D.C.

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